Case No.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

WARD CONNERLY and CALIFORNIANS FOR EQUAL RIGHTS / NO ON 16,
Petitioners,

v.

SUPERIOR COURT
(Sacramento Superior Case No: 34-2020-80003439
Hon. Steven M. Gevercer, Dept 27)
Respondent,

ALEX PADILLA, in his official capacity as the Secretary of State of the State of California, JERRY HILL, in his official capacity as State Printer, XAVIER BECERRA, in his official capacity as ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Real Parties in Interest.

ORIGINAL WRIT PROCEEDING
IMMEDIATE RELIEF REQUESTED

EMERGENCY PETITION FOR WRIT OF MANDATE, AND MEMORANDUM OF POINTS AND AUTHORITIES

TEMPORARY STAY OF SUBMISSION OF BALLOT MATERIALS, OR ALTERNATIVELY BALLOT LABEL OF PROPOSITION 16, TO STATE PRINTER REQUESTED

ELECTION LAW MATTER ENTITLED TO CALENDAR PREFERENCE PURSUANT TO CALIFORNIA CODE OF CIVIL PROCEDURE §35; ELECTIONS CODE § 13314(a)(3).
Critical Date: August 10, 2020

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Petitioners hereby certify that they are not aware of any person or entity that must be listed under the provisions of California Rule of Court 8.208(e).

Dated: August 9, 2020

By: s/ *Bradley A. Benbrook*
Bradley A. Benbrook
Attorneys for Petitioners

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TO THE HONORABLE PRESIDING JUSTICE AND HONORABLE ASSOCIATE JUSTICES OF THE THIRD DISTRICT COURT OF APPEAL:

INTRODUCTION

The coming election has seen an unprecedented number of biased initiative ballot labels and titles and summaries prepared by the Attorney General's Office, which seek to influence the outcome of the vote. Editorial boards across the State have criticized this clear bias in conflict with the Attorney General's obligations under Elections Code section 9051, subdivision (c) to write a "true and impartial statement of the purpose of the measure in such language that . . . shall neither be an argument, nor be likely to create prejudice, for or against the proposed measure." *E.g.*, Editorial Board, The Los Angeles Times, "*Editorial: California Voters Need Unbiased Ballot Information. Instead, Becerra is Playing Favorites*," Aug. 4, 2020; Editorial Board, The San Diego Union Tribune, "*Editorial: California Needs to Take This Job Away from Attorney General Xavier Becerra ASAP*," Jul. 30, 2020; Editorial, The San Francisco Chronicle, "*California Attorney General Loads Language on 2 November Measures*," July 26, 2020.

Moreover, trial courts, including the court here (*see* Aug. 7, 2020 Transcript (Exhibit F), 9:7-11, 10:10-15, 25:5-16), have expressed concern that the ballot labels appear misleading; but despite those concerns, the Attorney General has successfully hidden behind the judicially-created doctrine of deference to slant the description of measures and thereby influence the election in violation of his duties under the Elections Code. This is especially clear in the case of Proposition 16, the initiative that repeals Proposition 209, but whose ballot label deliberately refuses to acknowledge exactly what it is repealing, namely a prohibition on granting race- and gender-based preferences in public employment, education, and contracting.

Instead, the ballot label states that Proposition 16 "allows diversity" or "permits . . . *policies*" to merely "consider" race or sex to "address diversity." As explained further herein, this language is highly misleading and an argument in favor of the initiative.

On August 7, 2020, the Superior Court denied petitioner's challenge of the ballot label based in large part on a misapplication of this Court's decision granting deference in *Becerra v. Superior Court* (2017) 19 Cal. App. 5th 967 (*Becerra*) – even though the trial court found that the Attorney General's language was "misleading" "[b]ecause current law does allow diversity." Ex. F, Trans., 25:8-16. Instead, the trial court found that the ballot label – the description of the initiative found on the ballot itself (and the sample ballot) – could be read in the context of the title and summary, which is an entirely separate document. *Id*. at 11:25-12:7, 25:17-26:14. But *Becerra* only found that the title and summary, which are "a single document," should be read together to determine if the text is "not misleading, argumentative, or likely to create prejudice against the measure." *Becerra*, *supra*, 19 Cal. App. 5th at 976–77.

This petition challenges *only the ballot label* for Proposition 16, which is solely and expressly a repeal of Proposition 209, found in article I, section 31 of the Constitution.[1] Yet, as noted above, the proposed ballot label for Proposition 16 – the description of the measure that will be in the sample ballot and which will appear on the ballot itself – never sets forth the principal action that Proposition 209 prohibits and what Proposition 16 actually seeks to repeal: granting race- and gender-based preferences. Instead, the Attorney General's description of Proposition 16 is an argument plainly designed to

[1] Given the very limited time for the Court's review of the ballot title and summary for the State California Voter Information Guide, the petitioners, while not conceding the imperfections of the title and summary, do not contest it.

create prejudice in favor of the measure, using euphemisms and feel-good language, like "[a]llows diversity" (what voter could be against merely allowing diversity?), without explaining to the voters that the measure's sole purpose is to repeal the prohibition against race and gender-based preferences.

Unless this Court steps in – and this Court is the only court that can do so since the venue for challenges must be in Sacramento County (Elec. Code § 9092) – enforcement of the Attorney General's obligation to "give a true and impartial statement of the purpose of the measure" that is neither "argument, nor . . . likely to create prejudice … for … the measure" will become a dead letter. Elec. Code § 9051, subd. (c). *Undue deference* under judicially-created doctrine becomes *a license* and will render obsolete the statutory command of impartiality without argument and without favor.

Proposition 16 is short and consists of only nine words: It *repeals* the constitutional prohibition enacted in Proposition 209 against "discriminat[ing] against, or grant[ing] preferential treatment . . . on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Cal. Const., art. I, § 31. The operative clause of Proposition 209 is only 37 words, and thus easily included in full (or only lightly edited) within a ballot label of 75 words. An impartial Attorney General should have described Proposition 16 as repealing the constitutional prohibition against granting preferences based on race, sex, color, ethnicity, or national origin in public employment, public education, and public contracting." Instead, the Attorney General's ballot label states:

> ***Allows diversity*** **as a factor in public employment, education, and contracting decisions. Legislative Constitutional Amendment**. *Permits* government decision-making *policies to consider* race, sex, color, ethnicity, or national origin *in order to address diversity* by repealing

constitutional provision prohibiting such policies. (Italics added.)

This ballot label is false, misleading, likely to create prejudice for the measure, and improperly argumentative (any one of which disqualifies the text under the Code) for many reasons, including:

1. As the trial court recognized (Trans., 25:12-16), Proposition 209 already "allows" "decision-making policies" to "consider" race, sex, and ethnicity "in order to address diversity" since policies today can consider race- and gender-based imbalances in devising policies as long as race-neutral or gender-neutral means are used to "address" imbalances so that those who are actually disadvantaged are targeted, rather than granting a preference solely on the basis of skin color, ethnicity, or gender. Such examples of race- and gender-neutral means that are designed to increase diversity include outreach to low-income communities and low-income school districts, favoring businesses and people in low-income communities, eliminating standardized tests that may disproportionately impact some minority communities in university admissions, among countless others.

2. Likewise, it is misleading to suggest Proposition 16 "allows diversity," when Proposition 209 "allows diversity" through race-neutral means as reflected by the fact that under the current prohibition against racial preferences, UC has admitted the most diverse freshman class ever in 2020, with Latinos comprising 36% of admissions, Asian-American comprising 35%, whites falling to 21%, and African-Americans steady at 5%. *See* Univ. of California, *UC admission of California students at all-time record high* (July 16, 2020), https://www.universityofcalifornia.edu/press-room/uc-admission-california-students-all-time-record-high.

3. Significantly, there is no mention in the ballot label that Proposition 16 *repeals the prohibition* against *granting race and gender preferences* – which is what Proposition 16 targets. This is a material and

deliberate omission that cannot be allowed to stand. This is not subtle or nuanced application of discretion accorded the Attorney General; it is an abuse of discretion to call a simple repeal of a constitutional provision against preferences something else entirely. The Attorney General has stood on its head the most simple and direct descriptive task mandated by section 9051.

4. Nor does the ballot label state that Proposition 16 "*allows* race- and gender-based *preferences*." By definition, Proposition 16 must *allow* what Proposition 209 *prohibits*.

The Attorney General is plainly refusing to acknowledge what is actually being repealed – the prohibition on race and gender preferences – doubtless because such transparency might cost votes in favor of the measure. But under the Elections Code, it is not the Attorney General's job to draft a label to favor one side but precisely the opposite; only in the Voter Information Guide are proponents (like the Attorney General) and opponents of an initiative given space in the Voter Information Guide where they can spice up their arguments and rebuttals with loaded, value-laden polemics. In this case, the Attorney General favored proponents of the measure, even though the Elections Code expressly prohibits a label that is "an argument" or is "likely to create prejudice, for or against the proposed measure." If the court allows deference to trump this prohibition, the prohibition against a description that is an argument no longer has any force, undermining the right to a remedy under Elections Code section 9092, which authorizes writ relief not only for clear and convincing proof of a misleading text, but a text that is "inconsistent with the requirements of this code," which includes the prohibition against argument or a text likely to create prejudice, for or against the proposed measure" Elec. Code § 9051(c).

The superior court expressed concern with the statement in the ballot label (and repeated in the title and summary) that Proposition 16 "allows diversity," but as noted, it erred by misapplying this Court's decision in

Becerra, 19 Cal. App. 5th 967, by reasoning that the *title and summary* read as a whole somehow saved the misleading *ballot label*. But *Becerra did not even concern a ballot label to be presented* to *the electorate*. *Becerra* only held that logically a ballot *title* should be considered together with a ballot *summary*, as title and summary are inseparable, and a court would have to consider them together. And since the ballot label does not appear next to the title and summary (in the Voter Information Guide or otherwise), it makes no sense to assume that language in the title and summary could possibly cure defects in a ballot label.

Instead, the ballot label the Attorney General is required to provide under Elections Code section 9051 is distinct from the title and summary. Moreover, the "ballot label" appears in three entirely different documents: (1) the State Voter Information Guide, in a section which is called Summary of Ballot Measures and is completely separate from the Title and Summary, Legislative Analysis and ballot arguments for each measure; (2) in 58 County-produced and distributed "Official Sample Ballots" or "County Voter Information Guides"; and (3) on printed ballots on which voters actually mark to cast their votes.

Moreover, while only some voters make their way through the tedious and lengthy State Voter Information Guide, all voters who vote necessarily see the ballot label on their ballots – it sits directly adjacent to where they vote "yes" or "no" vote.[2] Numerous courts have concluded that the language

[2] As for the ballot labels, several Supreme Court cases demonstrate the importance of such materials, because ballot language arrives in front of the voter "at the most crucial stage in the electoral process – the instant before the vote is cast." *Anderson v. Martin* (1964) 375 U.S. 399, 402; *see also Cook v. Gralike* (2001) 531 U.S. 510, 542 (Rehnquist, C.J., concurring) (ballot language is "is the last thing the voter sees before he makes his choice"); *Wash. State Grange v. Wash. State Republican Party* (2008) 552 U.S. 442, 460 (Roberts, C.J., and Alito, J. concurring) (party designation on ballot) (same).

on the ballot has an unparalleled influence on voters and thus deserves the highest scrutiny to ensure accuracy and impartiality. Its centrality and primacy have long been recognized; indeed, the ballot label description can be dispositive in an election. That is why the Court must give great weight to whether the Attorney General fulfills his legal mandate to write a ballot label that is not false, misleading or partial to one side or another. It must not be presumed that defects in a ballot pamphlet can somehow be cured by reference to a separate title and summary in the Voter Information Guide.

Petitioners ask this Court for an emergency, temporary stay of the submission of the ballot materials to the State Printer, or alternatively, submission of the ballot label for Proposition 16, so that the Court can consider this Petition. (Petitioners note that they are aware of at least three other Petitions for Writ of Mandate involving Propositions 15, 20 and 22 pending before this Court. Importantly, the Attorney General has sought to stay the Superior Court's ruling modifying his title and summary in Proposition 20 so that his original title and summary can go to the printer without careful court review.)

There is precedent for temporary stay of the printing deadline for the court to consider such important matters that fundamentally affect the precious right of the electorate to vote on ballot issues. *See*, *e.g.*, *Yes on 25, Citizens for an On-Time Budget v. Super. Ct.* (2010) 189 Cal. App. 4th 1445, 1449. And such a stay of the submission of the *ballot label* will not unduly interfere with the conduct of the November 2020 election, will not unduly prejudice the printing of the State Voter Information Guide (which can proceed with all of the other information until it receives the ballot label for Proposition 16) and will have *no prejudice* upon printing of the "ballot label" on 58 county "sample ballots" or the actual voters' ballots. The last date local election officials can receive candidate and ballot information from the Secretary of State and information concerning local candidates and ballot

measures for printing ballots and county "sample ballots" is August 27, 2020. *See, e.g.*, Sec'y of State November 3, 2020 General Election Calendar at 8–7 (Item 38), https://bit.ly/33KzWS2; Orange Cty. Local Elections Calendar at 8, https://bit.ly/3a8dDXG.

Even if submission of the ballot label for Proposition 16 is delayed for several weeks, there is plenty of precedent for the submission of a supplemental sample ballot to be distributed to voters for a myriad of reasons. Preventing a misleading ballot label that will be viewed by, and influence, every voter – particularly when it affects a constitutional provision – is too important to preclude a supplemental ballot, which ultimately is a remedy resulting from the Attorney General's failure to comply with his obligation to prepare an impartial label, title, and summary.

The time for examination of ballot labels is always tight. But deference cannot be turned into a license to tilt elections with labels that benefit the Attorney General's allies, in the case the Legislature that placed Proposition 16 on the ballot.

APPLICATION FOR AN IMMEDIATE STAY

Petitioners request an immediate stay of the August 7 order, judgment, and writ of mandate attached hereto as **Exhibit E**. Petitioners also request that, in addition to issuing a peremptory writ of mandate, the Court issue a "mandatory stay that effectively grants petitioners the relief to which" they are entitled. *Yes on 25*, *supra*, 189 Cal. App. 4th at 1449. Petitioners request a stay of the submission of the ballot materials, or at least the ballot label for Proposition 16, to the state printer pending further order of the Court.

PETITION FOR WRIT OF MANDATE

Petitioners WARD CONNERLY and CALIFORNIANS FOR EQUAL RIGHTS / NO ON 16 seek a writ of mandate directed at Real Party in Interest ATTORNEY GENERAL XAVIER BECERRA to correct the false, misleading, and prejudicial ballot materials authored by him in connection with Proposition 16.

Petitioners allege as follows:

1. This action concerns the ballot materials for Proposition 16, which will appear on the ballot in the November 3, 2020 General Election. Proposition 16 was placed on the ballot as a legislative constitutional amendment (Assembly Constitutional Amendment 5). The measure would repeal article I, section 31, of the California Constitution, which was added by the adoption of Proposition 209 at the November 1996 General Election. Proposition 209 enacted a prohibition against discrimination or preferential treatment by the state and public entities based on race, sex, color, ethnicity, or national origin. Cal. Const., art. I, § 31(a).

2. Elections Code section 9051 requires Real Party Attorney General Xavier Becerra to provide the Secretary of State with a ballot title and summary that is "a true and impartial statement of the purpose of the measure in such language that . . . shall neither be an argument, nor likely to create prejudice, for or against the proposed measure." Elec. Code § 9051(c). "The ballot title and summary 'must reasonably inform the voters of the character and real purpose of the proposed measure.'" *Lungren v. Super. Ct.*, 48 Cal. App. 4th 435, 440 (1996) (quoting *Tinsley v. Super. Ct.*, 150 Cal. App. 3d 90, 108 (1983)). The Attorney General must also prepare a ballot label, which is a condensed version of the ballot title and summary not to exceed 75 words. Elec. Code § 9051(b). As shown below, the ballot label and title and summary authored by the Attorney General for Proposition 16 violates the Elections Code.

3. Unless directed by this Court, real parties in interest Secretary of State Alex Padilla and State Printer Jerry Hill will, in their official capacities, cause to be printed the false, misleading, and argumentative ballot labels in the State Voter Information Guide and every ballot distributed to California voters.

PARTIES

4. Petitioner Ward Connerly is President of Californians for Equal Rights and co-chair of Californians for Equal Rights / No on 16. Connerly is a registered California voter and signer of the official Argument Against Proposition 16.

5. Petitioner Californians for Equal Rights / No On 16 ("CFER") is the committee opposing Proposition 16, and the organization's leadership signed the official Argument Against Proposition 16.

6. Respondent is the Superior Court of the State of California, in and for the County of Sacramento. The ruling challenged herein was issued by the Honorable Steven M. Gevercer (Department 27) on August 7, 2020.

7. Real Party in Interest ALEX PADILLA ("Secretary of State") is the Secretary of State of California and is the State's chief elections officer. He is charged with the duty of preparing the State Voter Information Guide (i.e. the "ballot pamphlet") with respect to statewide initiative measures, as well as directing the printing of ballots by the 58 County Registrars of Voters. Elec. Code, §§ 9081-9086.) Elections Code sections 9092 and 13314 required that the Secretary of State be named as a Respondent in the underlying proceeding. He is named in his official capacity only.

8. Real Party in Interest JERRY HILL ("Hill") is the State Printer of the State of California. Hill is charged with printing the ballot pamphlet prepared by the Secretary State. Elections Code section 9092 required that the State Printer be named as a Real Party in Interest in the underlying proceeding. Hill is named in his official capacity only.

9. Real Party in Interest ATTORNEY GENERAL XAVIER BECERRA ("Attorney General") is charged with the statutory duty to prepare an accurate, fair, and impartial ballot label and ballot title and summary for initiative measures that have qualified for the ballot. Elections Code section 9092 required the Attorney General to be named as a Real Party in Interest in the underlying proceeding.

JURISDICTION AND VENUE

10. Elections Code section 9092 provides a 20-day period in which voters are entitled to review the ballot materials and file any legal challenges. Petitioners are informed and believe that any legal challenges to ballot materials must be completed by August 10, 2020 for the November 3, 2020 General Election.

11. This Court has jurisdiction over this matter pursuant to California Constitution, article IV, section 10, and under Elections Code sections 9092 and 13314. Pursuant to Elections Code section 13314(a)(3), this action "shall have priority over all other civil matters" pending before the court.

12. The Elections Code mandates that the exclusive venue for this action is Sacramento County. Elec. Code §§ 9092, 13314(b).

GENERAL ALLEGATIONS

13. In the November 1996 General Election, California voters adopted Proposition 209, which enshrined in the state constitution a prohibition against discrimination or preferential treatment by the state and public entities based on race, sex, color, ethnicity, or national origin. Cal. Const., art. I, § 31. Article I, section 31 provides, in full:

> (a) The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

(b) This section shall apply only to action taken after the section's effective date.

(c) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.

(d) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.

(e) Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the State.

(f) For the purposes of this section, "State" shall include, but not necessarily be limited to, the State itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the State.

(g) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California antidiscrimination law.

(h) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

14. Earlier this summer, the California Legislature passed Assembly Constitutional Amendment 5, which placed a measure on the ballot – Proposition 16 – to reverse Proposition 209 by repealing article I, section 31 in its entirety. A true and correct copy of the text of Proposition 16 is attached hereto and incorporated herein as **Exhibit A**.

15. This writ petition is directed at the proposed ballot label. Under Elections Code section 9051(c), the ballot title and summary (which is not challenged here) must provide a "true and impartial statement of the purpose of the measure in such language that . . . shall neither by an argument, nor be likely to create prejudice for or against the proposed measure." Elec. Code § 9051(c). The shorter ballot label is a "condensed" version of the title and summary. *Id.*, subd. (b).

16. "[A] ballot summary cannot be misleading. It must reasonably inform the voter of the character and real purpose of the proposed measure." *Tinsley*, 150 Cal. App. 3d at 108 (citations omitted). "The main purpose of these requirements is to avoid misleading the public with inaccurate information." *Yes on 25*, 189 Cal. App. 4th at1452 (quoting *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal. 3d 208, 243). Furthermore, the California Supreme Court has instructed that "the government may not 'take sides' in election contests or bestow an unfair advantage on one of several competing interests." *Stanson v. Mott* (1976) 17 Cal. 3d 206, 217. To that end, governmental "attempts to influence the resolution of issues which our Constitution leaves to the 'free election' of the people . . . present[s] a serious threat to the integrity of the electoral process." *Id.* at 218.

17. On July 21, 2020, the Secretary of State published the draft copy of the Official Voter Information Guide for the November 3, 2020 General Election for public examination.

18. The Attorney General's proposed ballot label for Proposition 16 reads as follows:

> **ALLOWS DIVERSITY AS A FACTOR IN PUBLIC EMPLOYMENT, EDUCATION, AND CONTRACTING DECISIONS. LEGISLATIVE CONSTITUTIONAL AMENDMENT.** Permits government decision-making policies to consider race, sex, color, ethnicity, or national

origin in order to address diversity by repealing constitutional provision prohibiting such policies.

19. A true and correct copy of the Ballot Label for Proposition 16 is attached as **Exhibit B**.

20. The Attorney General's proposed title and summary for Proposition 16 reads as follows:

> **ALLOWS DIVERSITY AS A FACTOR IN PUBLIC EMPLOYMENT, EDUCATION, AND CONTRACTING DECISIONS, LEGISLATIVE CONSTITUTIONAL AMENDMENT.**
>
> - Permits government decision-making policies to consider race, sex, color, ethnicity, or national origin to address diversity by repealing article I, section 31, of the California Constitution, which was added by Proposition 209 in 1996.
> - Proposition 209 generally prohibits state and local governments from discriminating against, or granting preferential treatment to, individuals or groups on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, education, or contracting.
> - Does not alter other state and federal laws guaranteeing equal protection and prohibiting unlawful discrimination.

A true and correct copy of the Title and Summary for Proposition 16 is attached as **Exhibit C**.

21. Elections Code section 9092 provides that this Court may issue a writ of mandate to prevent the publication of material in the ballot pamphlet that is "false, misleading, or inconsistent with the requirements of [the Elections Code] or Chapter 8 (commencing with Section 88000) of Title 9 of the Government Code," and Elections Code section 13314 authorizes the Court to issue a peremptory writ of mandate "upon proof . . . that an error, omission, or neglect" violates the California Constitution and "that issuance of the writ will not substantially interfere with the conduct of the election." Elec. Code § 13314(a)(2).

22. Petitioners challenged the ballot label and title and summary in the Sacramento Superior Court pursuant to these sections of the Elections Code. A true and correct copy of all of the pleadings submitted by Petitioner, Respondent, and Real Parties in the trial court alleging the same violations of law, are attached hereto as **Exhibits D1–D9.**

23. A true and correct copy of the trial court's ruling denying Petitioners' Petition for Writ of Mandate in Case No. 34-2020-80003439 (Hon. Steven M. Gevercer) on August 7, 2020 is attached hereto as **Exhibit E.**

24. Petitioners have no other adequate remedy at law and will suffer immediate and irreparable injury unless this Court issues a writ of mandate deleting or amending the false, misleading and prejudicial statements as described herein.

25. Petitioners are informed and believe, and on that basis allege, that issuance of a writ requiring the amendments and deletions set forth below will not interfere with the printing and distribution of the ballot pamphlet. According to the Secretary of State's November 3, 2020 California Statewide General Election Calendar, the period for public review and legal challenges to any ballot label contained in the State Voter Information Guide for the provisions of Proposition 15 began July 21, 2020 and ends August 10, 2020.

FIRST CAUSE OF ACTION

[BALLOT LABEL FOR PROPOSITION 16]

26. Petitioners incorporate paragraphs 1 through 25 of this Petition.

27. The entire substantive content of Proposition 16's change to the Constitution is as follows: "That Section 31 of Article I thereof is repealed." As a result, the only way to understand Proposition 16's character and purpose – including what does and does not "allow" – is by reference to

Proposition 209. The Legislature could have proposed substantive additions to the California Constitution regarding "diversity" or other subjects as part of Proposition 16, but it chose not to. Instead, it chose only to repeal Proposition 209.

28. The ballot label authored by the Attorney General for Proposition 16 is false, misleading, argumentative, not impartial, and prejudicial within the meaning of Elections Code sections 9051 and 9092 in the following respects:

a. The only types of "factors" that Proposition 209 forbids from controlling a government decision in education, contracting, and hiring are race, sex, color, ethnicity, and national origin. But state and local governments are "allowed" under Proposition 209 to consider many other types of diversity – notably socioeconomic diversity – and they do. It is therefore false, misleading, argumentative, and prejudicial to tell voters that passing Proposition 16 would "allow diversity as a factor" and that Proposition 16 is needed "in order to promote diversity" when diversity is already being pursued as a factor in state and local government decisions every day.

b. The ballot label does not mention repeal of race and gender preferences – the entire purpose of the repeal.

c. "Considering" race and sex in decision-making policies is distinct from granting a race- or gender-based preference in effectuating those policies.

d. The statement that Proposition 16 "permits government decision-making policies to consider race, sex . . . in order to address diversity" does not state that this will be done through race and gender preferences.

e. The Statement that the measure "permits government decision-making policies to consider race, sex . . . in order to address

diversity by repealing constitutional provision prohibiting such policies" is misleading and prejudicial because the repeal is not of a prohibition against *considering* race and sex in government decision-making policies, but a strict prohibition against granting race- and gender-based *preferences*. Under the current prohibition, race and sex disparities can be considered in policy decisions, with granting preferences, such as expanding outreach for admissions to low-income school districts, by accepting the top 10% from every school district, or by eliminating test requirements that disparately impact minorities.

28. The Attorney General's euphemistic characterizations of Proposition 16 was no accident; instead of precisely and accurately describing the proposition as repealing a prohibition against granting race- or gender-based preferences, the Attorney General's label tries to spin the analysis using terms that nowhere appear in either Proposition 16 or Proposition 209.

29. The superior court erred in rejecting Petitioner's challenge. The superior court stated multiple times that it was concerned by the statement in the ballot label (and repeated in the title and summary) that Proposition 16 "allows diversity." Trans., 9:7-11 (Exhibit F) ("But 'allow' is what I'm a little bit troubled by. Because does the repeal allow diversity? Wouldn't a reasonable voter infer that currently it's not allowed if the repeal is going to allow it? That's a concern to the Court."); *id*. at 10:10-15 ("I'm still a little troubled by the word 'allow.' 'Allows diversity' right off the bat, both in the Ballot Title and the Ballot Label, because voters want to know what are we repealing? We're repealing a law that must disallow it. I'm concerned about that."); *id*. at 25:7-11 ("And I'm going to repeat that the Court is concerned about you saying 'allows diversity' in the title. It does appear to be somewhat misleading in the title portion of the Title and Summary and repeated in Ballot Label.").

30. But the court nevertheless denied the petition. The court deferred to the Attorney General's discretion: "But I have to follow the Third District Court of Appeal and the guidance, and I'm going to find that the Title and Summary accurately sets forth the chief purpose and points of the repeal. In other words, there's a substantial compliance. It's not perfect. And I criticize using 'allows diversity' as the first two words, but the fact is when you put the bullet points under the Ballot and Title, it does say what Prop 209 does, and it does say that this proposal deletes that. It repeals it." *Id*. at 25:17-26.

31. The superior court also misapplied this Court's decision in *Becerra v. Superior Court* (2017) 19 Cal. App. 5th 967, by reasoning that the *title and summary* read as a whole somehow saved the misleading *ballot label*. *Id*. at 25:27-26:3 ("And I have to consider *Becerra v. Superior Court* at page 960 – it's 976. And they are very specific, 'Reading the Title and Summary together, we conclude that the text prepared by the AG is not misleading.'"); *id*. at 27:1-6 ("I'm considering them together. Thank you for that clarification. I'm considering them together. I've read them together. I read the Ballot Label, I read the Ballot Title and summary, and I'm considering them both together.").

32. This Court need not labor over the proper ballot label. The repealed prohibition is so short that there is no reason not to use the actual language being repealed, stating that Proposition 16 "repeals the constitutional prohibition against discriminat[ing] against, or grant[ing] preferential treatment . . . on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." In light of the time constraints and the Attorney General's deliberate effort to camouflage the actual purpose of Proposition 16 – a repeal of a specific constitutional provision – the Court is amply justified in selecting the mirror image of the language approved by this Court in *Lungren*

v. Superior Court (1996) 48 Cal. App. 4th 435, 440 (reversing superior court's modification that required references to "affirmative action" and instead approving ballot label language for Proposition 209).

33. Alternatively, if the Court prefers to maintain the Attorney General's more verbose ballot label, Petitioners proposed two non-prejudicial, less partial labels that describe the measure as follows:

> **ALLOWS ~~DIVERSITY AS A FACTOR IN PUBLIC EMPLOYMENT, EDUCATION, AND CONTRACTING DECISIONS~~ GOVERNMENT DECISION-MAKING POLICIES TO CONSIDER RACE, SEX, COLOR, ETHNICITY, OR NATIONAL ORIGIN BY REPEALING CONSTITUTIONAL PROVISION PROHIBITING SUCH POLICIES. LEGISLATIVE CONSTITUTIONAL AMENDMENT.** Applies to public education, employment and contracting. Fiscal Impact: No direct fiscal effect on states and local entities. The effects of the measure depend on the future choices of states and local government entities and are highly uncertain.

> **ALLOWS ~~DIVERSITY AS A FACTOR~~ CONSIDERATION OF RACE, SEX, COLOR, ETHNICITY, NATIONAL ORIGIN IN PUBLIC EMPLOYMENT, EDUCATION, AND CONTRACTING DECISIONS. LEGISLATIVE CONSTITUTIONAL AMENDMENT.** Permits government decision-making policies to consider race, sex, color, ethnicity, or national origin ~~in order to address diversity~~ by repealing constitutional provision prohibiting such policies. Fiscal Impact: No direct fiscal effect on states and local entities. The effects of the measure depend on the future choices of states and local government entities and are highly uncertain.

Exhibit D1, p. 8.

RELIEF REQUESTED

WHEREFORE, Petitioners pray that this Court:

1. Issue a peremptory writ of mandate directing the trial court to vacate its order of August 7, 2020 and to issue a new order commanding the Secretary of State to amend the ballot label for Proposition 16 as directed by this Court and to conform any translations of these materials to the changes ordered by this Court;

2. Stay submission of the ballot pamphlet to the printer, alternatively, stay submission of Proposition 16 for the ballot pamphlet, which can be added to the ballot pamphlet if time permits at the time of the decision, or is submitted to be included in a supplemental ballot pamphlet.

3. Issue a notice that the Court is considering issuance of a peremptory writ in the first instance.

4. Award Petitioners attorneys' fees and costs incurred in connection with this matter.

5. Grant other such and further relief as the Court may deem necessary.

Dated: August 9, 2020 Respectfully Submitted,

BENBROOK LAW GROUP, PC

By: s/ *Bradley A. Benbrook*
BRADLEY A. BENBROOK
Attorney for Petitioners

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION

I. INTRODUCTION

Instead of writing a "true and impartial statement of the purpose" of Proposition 16 as required by the Elections Code, the Attorney General has written an argument in favor of Proposition 16. This writ petition is brought to correct two false, misleading, and argumentative passages in the ballot label and title and summary describing the purported purpose of Proposition 16. Proposition 16 would repeal Proposition 209, which was approved by the voters in 1996 and added to the California Constitution as Article I, § 31. Proposition 209 enacted a simple prohibition: "The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." *Id.* § 31(a). Proposition 16's proposed repeal is even more brief: "That Section 31 of Article I thereof is repealed."

Given this, the simple purpose of Proposition 16 is overturning Proposition 209's ban on preferences on the basis of race, sex, color, ethnicity, or nation origin in public education, employment, and contracting. The Attorney General's proposed ballot label for Proposition 16 improperly takes sides in the election by twice leaning on the high-polling buzzword "diversity" (a word nowhere to be found in Proposition 209 or 16) as the measure's supposed goal:

> **ALLOWS DIVERSITY AS A FACTOR IN PUBLIC EMPLOYMENT, EDUCATION, AND CONTRACTING DECISIONS. LEGISLATIVE CONSTITUTIONAL AMENDMENT.** Permits government decision-making policies to consider race, sex, color, ethnicity, or national origin in order to address diversity by repealing constitutional provision prohibiting such policies. Fiscal Impact: No direct fiscal effect on states and local entities. The effects of the

> measure depend on the future choices of states and local government entities and are highly uncertain.

Exhibit A.

Petitioners are challenging the ballot label under Elections Code § 9092 on the grounds that it is "false, misleading, or inconsistent with the requirements of th[e Elections] Code," and therefore must be stricken. It is inconsistent with the requirements of Elections Code § 9051(c), which requires the Attorney General to provide the Secretary of State with a ballot title and summary that is "a true and impartial statement of the purpose of the measure in such language that . . . shall neither be an argument, nor likely to create prejudice, for or against the proposed measure."

"The ballot title and summary 'must reasonably inform the voters of the character and real purpose of the proposed measure.'" *Lungren v. Super. Ct.* (1996) 48 Cal. App. 4th 435, 440 (quoting *Tinsley v. Super. Ct.* (1983) 150 Cal. App. 3d 90, 108). The Attorney General must also prepare a ballot label, which is a condensed version of the ballot title and summary not to exceed 75 words. Elec. Code § 9051(b). For many voters, the ballot label is the only information they will read about the measure. It is the last information all voters see before casting their vote. Elec. Code § 13247 (ballot label "shall be followed by the words, 'Yes' and 'No'" on ballot).

II. STANDARD OF REVIEW

This Court's review of this petition is *de novo.* Elections Code sections 9092 and 13314 authorize this Court to issue a writ of mandate ordering that changes be made to the official ballot materials to ensure that the information provided to voters meets the requirements of law. Section 13314 authorizes courts to issue a peremptory writ of mandate "upon proof . . . that an error, omission, or neglect of duty" is about to occur with regard to

the printing of the ballot materials" in violation of [the Elections Code] or the Constitution." Elec. Code § 13314(a)(2).

III. ARGUMENT

A. The Ballot Label Here Must Be Amended Because It Is False, Misleading, Argumentative, And Prejudicial.

This ballot label is false, misleading, prejudicial, and improperly argumentative for many reasons, including:

- Proposition 209 already "allows" "decision-making policies" to "consider" race, sex, and ethnicity "in order to address diversity" since the government today can consider race- and gender-based imbalances in devising policies as long as race-neutral or gender-neutral means are used to "address" imbalances so that those who are actually disadvantaged are targeted, rather than granting a preference on the basis of skin color, ethnicity, or gender. Such examples of race- and gender-neutral means that are designed to increase diversity include outreach to low-income communities and low-income school districts, favoring businesses and people in low-income communities, eliminating standardized tests that may disproportionately impact some minority communities in university admissions, among countless others.

- Likewise Proposition 209 "allows diversity" through race-neutral means as reflected by the fact that under the current prohibition of racial preferences, UC has admitted the most diverse freshman class ever in 2020, with Latinos comprising 36% of admissions, Asian-American comprising 35%, whites comprising 21%. *See* Univ. of California, *UC admission of California students at all-time record high* (July 16, 2020), https://www.universityofcalifornia.edu/press-room/uc-admission-california-students-all-time-record-high.

- Significantly, there is no mention in the ballot label that Proposition 16 *repeals the prohibition* against *granting race and gender*

preferences – which is what Proposition 16 targets. This is a material and intentional omission that cannot be allowed to stand. This is not subtle or nuanced illustration of discretion accorded the Attorney General; it is an abuse of discretion to call a simple repeal of a constitutional provision something else entirely. The Attorney General has stood on its head the most simple and direct descriptive task mandated by section 9051.

- Nor does the ballot label state that Proposition 16 "*allows* race- and gender-based *preferences*."

It should be plain that the Attorney General deliberately chose to avoid acknowledging what is actually being repealed – race and gender preferences – because such transparency might cost votes in favor of the measure. But under the Elections Code, it is not the Attorney General's job to draft a label to favor one side but precisely the opposite. Proponents and opponents of initiatives are given space where arguments and rebuttals with loaded, value-laden polemics can be used. In this case, the Attorney General favored the proponents, even though the Elections Code expressly prohibits a label that is "an argument" or is "likely to create prejudice, for or against the proposed measure." If the court allows deference to trump this prohibition, there is no remedy for its violation, thus undermining the separate provision for such a remedy in Elections Code § 9092.

The "diversity" buzzword gambit being pursued in Proposition 16's ballot label presents the mirror image of the dispute over ballot language in *Lungren v. Superior Court*, *supra*, when Proposition 209 was presented to the voters. In that election, "the title, summary and label provided by the Attorney General [we]re essentially verbatim recitations of [Proposition 209's] operative terms . . . ." 48 Cal. App. 4th at 441. Petitioners there argued that the Attorney General's title and summary, in order to be accurate, needed to say that Proposition 209 eliminated the practice of "affirmative action" – another malleable and politically popular term, like "diversity," when used

in a generic sense.

This Court rejected this argument, stressing that "affirmative action" programs "include not only the conduct which Proposition 209 would ban, i.e., discrimination and preferential treatment, but also other efforts such as outreach programs." 48 Cal. App. 4th at 442 (citing multiple definitions of "affirmative action"). "Accordingly, any statement to the effect that Proposition 209 repeals affirmative action programs would be overinclusive and hence 'false and misleading.'" *Id*. (quoting Elec. Code § 9092). For these exact reasons, the phrase "allows diversity as a factor" here is underinclusive and hence false and misleading: A repeal of Proposition 209 would not "allow diversity as a factor" to be considered in government programs because diversity already is being considered as a factor.

Just as the *Lungren* court observed about the term "affirmative action," "diversity" is an "amorphous, value-laden term," *id.* at 443, that fails to provide a "common base for intelligent discourse." *Id*. at 442.[3] As a result, the Attorney General inappropriately veers into argument and prejudice (forbidden by Elections Code § 9051(c)) by twice invoking "diversity" and making it the centerpiece of the ballot label. An effort to prejudice with amorphous terms like "diversity" or affirmative action is all the more apparent when the words in the actual measure are "all subject to common understanding," *id*. at 441, and the "brevity of the operative language of [the] Proposition . . . lends itself to the formulation of a title and summary of the initiative measure in its very own words." *Id*. at 440. Here, Proposition 16 is a *nine-word repeal* of Proposition 209. The Attorney General has claimed that Proposition 16's purpose is "allow[ing] diversity as a factor," despite the

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[3] *See*, *e.g.*, Chen, *Diversity in a Different Dimension: Evolutionary Theory and Affirmative Action's Destiny* (1998) 59 Oh. State L.J. 811, 815 ("Americans in general, and well-educated Americans in particular, regard 'diversity' as a catch-all, feel-good term.").

fact that the practice of using "diversity as a factor" is already allowed in the proposition being repealed. By definition, this is false, misleading, and prejudicial.

McDonough v. Superior Court (2012) 204 Cal. App. 4th 1169, is likewise instructive here. In *McDonough*, the court required San Jose to modify the title for a ballot measure from "PENSION REFORM" to "PENSION MODIFICATION" because the word "reform" was a "charged word" that was "argumentative" in context. 204 Cal. App. 4th at 1174–75. "The word 'reform' in both definition and connotation evokes a removal of defects or wrongs. By combining this charged word with 'pension' in the title, all in capital letters, the city council has implicitly characterized the existing pension system as defective, wrong, or susceptible to abuse, thereby taking a biased position in the very titling of the measure itself." *Id.* So it is here: The word "diversity" is a "charged word" that is "argumentative" in the context of the political debate over preferences because it "take[s] a biased position in the very titling of the measure itself." *Id*.

Likewise, in *Huntington Beach City Council v. Superior Court* (2002) 94 Cal. App. 4th 1417, 1433, the court held that the word "exemption" was "insufficiently neutral" to appear in the title of a tax measure because "the word, in . . . context, [was] advocacy by other means." *Id*. at 1433–34. Here the Attorney General's use of "diversity" is not neutral; it is "advocacy by other means," *id.* at 1434, that "casts a favorable light on one side of the" issue and thereby signals how the electorate should vote. *McDonough*, 204 Cal. App. 4th at 1174.

* * *

The superior court stated repeatedly that it was concerned by the statement in the ballot label (and repeated in the title and summary) that Proposition 16 "allows diversity," *see* Petition, ¶ 29, but it nevertheless

denied the petition, based in large part on the court's deference to the Attorney General's discretion. This was erroneous.

B. The Attorney General And The Superior Court Improperly Assumed The Attorney General Is Entitled To Extreme Deference.

The Attorney General does not have discretion to violate the statutory requirement that he write a ballot label and title and summary that is "a true and impartial statement of the purpose of the measure in such language that . . . shall neither be an argument, nor likely to create prejudice, for or against the proposed measure." Elec. Code § 9051(c). The superior court here deferred excessively to the Attorney General's discretion in writing a ballot label under *Becerra*.

1. The Original Basis For Deference Does Not Apply Here.

The doctrine of deference to the Attorney General originated because the Attorney General had to have discretion as to what points to include in a title and summary of a measure in light of the word limits for the title and summary. Virtually all of the early cases raised objections to omissions of key points and inclusions of others. Therefore, the high court ruled that "[i]f reasonable minds can differ whether a particular provision is or is not a 'chief point' of the measure[,] the determination of the attorney-general should be accepted." *Epperson v. Jordan* (1938) 12 Cal. 2d 61, 70; *Perry v. Jordan* (1949) 34 Cal. 2d 87, 94 ("a substantial compliance is sufficient and it need not contain a summary or index of the provisions of the measure"); *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal. 3d 208, 243 ("We have said … that the title and summary need not contain a complete catalogue or index of all of the measure's provisions"). From this sensible proposition arose a general statement of presumption in favor of the accuracy of the Attorney General's summary. But the doctrine of deference was not meant to protect against the use of words divorced from

the measure that were designed to favor one side or the other and were neither a true nor impartial statement as required by the Election Code. Otherwise, that requirement would be read out of the law.

The original reason for deference does not apply here. In this case, Proposition 16 involves a single purpose – allowing preferences based on race, sex, ethnicity, and national origin. Rather than simply saying that, the Attorney General chose language that misleads and tilts the debate.

Becerra v. Superior Court (2017) 19 Cal. App. 5th 967, for example, dealt with a 32-page initiative to repeal several recently-enacted gas taxes and voter registration fees. The petitioner in *Becerra* argued that the title and summary failed to "provide a true and impartial statement of the chief purposes and points of the measure," mainly by "omitting the words 'tax' and 'fee' from the title." *Id*. at 974. The trial court agreed and substantially rewrote the title and summary to bring more prominence to the words "tax" and "fee" and to emphasize that the programs funded by those taxes and fees would be eliminated. *See id.* at 973–74.

Unlike here, the 32-page proposal in *Becerra* sought to "repeal[] some statutory sections, amend[] other sections, and add[] still other statutory sections," which would have involved changes to six different codes. *Id*. at 973. This Court stated that deference to the Attorney General is justified by the "difficult task" in "discerning" and summarizing "the chief purposes and points" within a complicated ballot initiative:

> Implicit in these guidelines is that the Attorney General exercises judgment and discretion in discerning the chief purposes and points of an initiative measure which must be presented to the electorate in clear and understandable language. [*Yes on 25, Citizens for an On-Time Budget v. Super. Ct.*, 189 Cal.App.4th 1445, 1452 (2010) citing *Epperson*, 12 Cal.2d 61, 66, 70.] Accordingly, the Attorney General is afforded "considerable latitude" in preparing a title and summary. (*Tinsley v. Superior Court* (1983) 150 Cal.App.3d 90, 108; *see Yes on 25*, *supra*, 189 Cal.App.4th at pp. 1452-

> 53.) "This deference stems in part from the recognition that drafting a title and summary 'can be a difficult task where multiple reasonable interpretations . . . are possible.'" (*Yes on 25*, *supra*, 189 Cal.App.4th at p. 1453; *Zaremberg v. Superior Court* (2004) 115 Cal.App.4th 111, 117.)
>
> Thus, "[a]s a general rule, the title and summary prepared by the Attorney General are presumed accurate, and substantial compliance with the 'chief purpose and points' provision is sufficient." (*Amador Valley*, supra, 22 Cal.3d at p. 243; *see also Tinsley v. Superior Court*, *supra*, 150 Cal. App. 3d at p.108.) If reasonable minds may differ as to its sufficiency, the title and summary prepared by the Attorney General must be upheld (*Amador Valley*, supra, 22 Cal.3d at p.243) because "all legitimate presumptions should be indulged in favor of the propriety of the attorney-general's actions." (*Epperson v. Jordan*, *supra*, 12 Cal.2d at p. 66; *see Holmes v. Jones* (2000) 83 Cal. App. 4th 882, 888.)

Id. at 975 (emphasis added).[4]

This is a very different case. Proposition 16 is a nine-word repeal of a 290-word constitutional provision whose operative language consisted of only 37 words: "The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public

[4] Likewise, the initiative in *Tinsley* "significantly altered California equal protection law as it applied to school desegregation" and modified six different sections of the state constitution. 150 Cal. App. 3d at 105. The initiative in *Amador Valley* was Proposition 13, the complicated overhaul of the State's property tax system for residential and commercial properties. 22 Cal. 3d at 242–44. And *Zaremberg* involved a statewide referendum of "a relatively lengthy and complex bill with the goal of providing health care coverage to employees through contributions from both the employer and employee. The Attorney General was mandated to prepare a title and summary of the referendum to overturn this legislation in 100 words or less. This can be a difficult task where multiple reasonable interpretations of the referendum and the complex underlying legislation are possible." 115 Cal. App. 4th at 117.

education, or public contracting." There is nothing remotely "difficult" about "discerning the chief purposes and points" of Proposition 16 as in the cases cited above, so the justification for deferring to the Attorney General's discretion must be reduced accordingly.[5] The Attorney General chose to emphasize the politically-charged word "diversity," which appears nowhere in the operative language of Proposition 16 or the measure it is repealing, Proposition 209. Significantly, nowhere in the ballot label does the Attorney General state what is impartial and true – that Proposition 16 repeals the constitutional prohibition against race- and gender-based preferences. Instead, the ballot label euphemistically says that the government can simply "consider" race or sex, not grant preference based on it in decisionmaking, and all to simply allow some "diversity."

Thus, even granting that the Attorney General is entitled to some deference in word choices among otherwise impartial and accurate words, those are not the choices the Attorney General made here. This is hardly a case, as the Attorney General claimed below, where Petitioners are merely quibbling that "better words could [have] be[en] chosen or arranged differently" to convey the same message. *Becerra*, 19 Cal. App. 5th at 979. Nor, on the other hand, is it a situation where Petitioners propose a complete overhaul of the words chosen.[6] Petitioners have proposed modest revisions to cure the defects.

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[5] This is akin to the familiar rule of *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal. 4th 1, 10 ("Whether judicial deference to an agency's interpretation is appropriate and, if so, its extent — the 'weight' it should be given — is thus fundamentally *situational.*").

[6] While *Lungren v. Super. Ct.* cited the same discretion-rule cases in the Proposition 209 setting, it did so in the context of a substantial rewrite by the trial court of the Attorney General's summary, which had essentially tracked the language of the measure. 48 Cal. App. 4th at 440–41. Likewise, in *Becerra*, the trial court substantially altered the title and summary by adding

2. Deference Must Be Tempered In Light Of The Importance Of The Ballot Label.

The importance of the ballot label cannot be understated. Numerous courts have concluded that the language on the ballot has an unparalleled influence on voters and is, thus, deserving of the highest scrutiny to ensure accuracy and impartiality. Its centrality and primacy have long been recognized; indeed, the ballot label description can be dispositive in an election. To preserve the integrity of the election process, courts have been extremely solicitous of these provisions. Recognizing that the essential purpose of the official ballot pamphlet is to *give voters truthful information* concerning ballot measures, and that they can have a "*substantial impact on the equality and fairness of the electoral process*" since they are assembled, published and distributed by the state, California courts have been extremely attentive to claims under these provisions. *Patterson v. Bd. of Supervisors* (1988) 202 Cal. App. 3d 22, 30 (emphasis added); *Brennan v. Bd. of Supervisors* (1981) 125 Cal. App. 3d 87, 91 (the law "clearly empowers trial courts to examine the content of a ballot digest to determine if it *fairly* represents the measure it summarizes" and noting that a court has "broad powers of review" in determining whether the ballot materials are accurate and unbiased) (emphasis in original); *see also Lungren*, 48 Cal. App. 4th at 440. The California Supreme Court has acknowledged that government provided ballot materials have the "imprimatur of official approval" and that it is "quite likely" such documents "would carry greater weight in the minds of the voters than normal campaign literature . . . ." *Knoll v. Davidson* (1974) 12 Cal. 3d 335, 352.

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an entirely new introductory sentence that emphasized fees and taxes would be repealed under the initiative. 19 Cal. App. 5th at 973–74.

As noted above, the language on the ballot has an unparalleled influence on voters and is thus deserving of the highest scrutiny to ensure accuracy and impartiality. This is because ballot language arrives in front of the voter "at the most crucial stage in the electoral process – the instant before the vote is cast." *Anderson v. Martin* (1964) 375 U.S. 399, 402; *see also Cook v. Gralike* (2001) 531 U.S. 510, 542 (Rehnquist, C.J., concurring) (ballot language is "is the last thing the voter sees before he makes his choice"); *Wash. State Grange v. Wash. State Republican Party* (2008) 552 U.S. 442, 459 (Roberts, C.J., and Alito, J., concurring) (party designation on ballot); *State ex rel. Voters First v. Ohio Ballot Bd.* (Ohio 2012) 978 N.E.2d 119, 126 ("in many instances, the only real knowledge a voter obtains on the issue for which he is voting comes when he enters the polling place and reads the description of the proposed issue set forth on the ballot") (internal quotation marks omitted); *Ex parte Tipton* (S.C. 1956) 93 S.E.2d 640, 644 ("The reasonable assumption is that [the voter] reads the question proposed on the ballot, and that his vote is cast upon his consideration of the question as so worded").

That is why the Court must closely consider whether the Attorney General fulfills his legal mandate for writing a ballot label that is not false, misleading or partial to one side or another.

3. The Attorney General's Discretion Is Even Further Limited By Constitutional Requirements Of Impartiality.

The Attorney General's discretion in preparing ballot materials is further limited by the Constitution's requirement of governmental impartiality; he cannot tilt the debate with word choices. Ballots materials prepared by the government, unlike ballot arguments, "are hemmed in by the constitutional guarantees of equal protection and freedom of speech," which means "in practical effect, that the wording on a ballot or the structure of the ballot cannot favor a particular partisan position." *Huntington Beach City*

Council, 94 Cal. App. 4th at 1433 (citation omitted). In emphasizing "[t]he importance of governmental impartiality in electoral matters," the California Supreme Court has explained that because "a fundamental goal of a democratic society is to attain the free and pure expression of the voters' choice," the "state and federal Constitutions mandate that the government must, if possible, avoid any feature that might adulterate or, indeed, frustrate, that free and pure choice." *Stanson*, 17 Cal. 3d at 219 (citation omitted); *see Gould v. Grubb* (1975) 14 Cal. 3d 661, 677 ("In our governmental system, the voters' selection must remain untainted by extraneous artificial advantages imposed by weighted procedures of the election process."). To that end, Courts must defend citizens against government interference in the initiative, which is "one of the most precious rights of our democratic process." *Rossi v. Brown* (1995) 9 Cal. 4th 688, 695.

Government actors violate their duty to remain impartial where ballot language "signals to voters the [government's] view of how they should vote, or casts a favorable light on one side of the [issue] while disparaging the opposing view." *McDonough*, 204 Cal. App. 4th at 1174 (citation omitted); *see also Martinez v. Super. Ct.* (2006) 142 Cal. App. 4th 1245, 1248 (ballot language is partial if it "hint[s] at how the electorate should vote"). To ensure governmental impartiality, several courts have struck or modified ballot language when the government veers into inappropriate advocacy.

Unless this Court steps in to enforce these principles, the Attorney General's obligation to "give a true and impartial statement of the purpose of the measure" which is neither "argument, nor likely to create prejudice [] for or against the . . . measure" will become a dead letter. Elec. Code § 9051(c). Undue deference under judicially-created doctrine will render obsolete the statutory command of impartiality without argument and without favor. And it will undermine the Legislature's allowance for voters to seek a remedy for

false, misleading, argumentative, and prejudicial ballot labels under Elections Code § 9092.

C. The Superior Court Misapplied *Becerra* In Any Event.

In any event, the superior erred by relying on *Becerra* as support for its conclusion that the *title and summary* read as a whole somehow saved the misleading *ballot label*. Trans., Ex. F 25:5–27:7. *Becerra* did not concern an initiative constitutional amendment or a legislative constitutional amendment, and surely not a legislative constitutional amendment that simply repeals a constitutional provision. *Becerra did not even concern a ballot label to be presented to the electorate*. It only concerned a dispute over a title and summary of a proposed initiative statute for petition signers that if successful then might qualify for the ballot. Only then does the Attorney General's statutory duty arise to craft a *ballot label*. *Becerra* observed that logically a ballot *title* should be considered together with a ballot *summary*, as title and summary comprise a single document. 19 Cal. App. 5th at 976.

Becerra did *not* consider whether the same consideration must be given to reading the ballot label together with the title and summary. The ballot label is supposed to be a shortened version of, and summarize even more succinctly, the title and summary. But here, the ballot label distorts the title and summary in a manner that is false, misleading and not impartial for the many reasons set out above. And since they do not appear next to each other (in the Voter Information Guide or otherwise) it makes no sense to assume that language in the title and summary could possibly cure defects in a ballot label. Instead, here, the voters are left to see a misleading and prejudicial ballot label as their last (and perhaps only) information about Proposition 16 before casting their vote.

IV. CONCLUSION

Proposition 209's prohibitions are so short that a simple repeal can be described simply: Proposition 16 "repeals the constitutional prohibition against discriminat[ing] against, or grant[ing] preferential treatment . . . on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." In light of the time constraints and the Attorney General's deliberate effort to camouflage the actual purpose of Proposition 16 the Court is amply justified in selecting the mirror image of the language approved by this Court in *Lungren,* 48 Cal. App. 4th at 440 (reversing superior court's modification forcing references to "affirmative action" and approving ballot label language for Proposition 209).

Alternatively, if the Court prefers to maintain the Attorney General's more verbose ballot label, Petitioners proposed two non-prejudicial, less partial labels that fairly describe the measure in paragraph 33 of the Petition above.

Petitioners request that the Court issue a peremptory writ of mandate directing the trial court to vacate its order of August 7, 2020 and to issue a new order commanding the Secretary of State to amend the ballot label for Proposition 16 as directed by this Court and to conform any translations of these materials to the changes ordered by this Court.

Petitioners further request that the Court stay submission of the ballot pamphlet to the printer while it decides this petition, or alternatively, stay submission of the ballot label for Proposition 16 for the ballot pamphlet, which can be added to the ballot pamphlet if time permits at the time of the decision, or is submitted to be included in a supplemental ballot pamphlet.

Respectfully submitted,

Dated: August 9, 2020

BENBROOK LAW GROUP, PC

By s/ *Bradley A. Benbrook*
BRADLEY A. BENBROOK
Attorneys for Petitioners

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed brief of Petitioners Ward Connerly and Californians for Equal Rights/No On 16 is produced using 13-point Roman type including footnotes and contains 10,516 words, which is fewer than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: August 9, 2020

By: s/ *Bradley A. Benbrook*
Bradley A. Benbrook
Attorneys for Petitioners

VERIFICATION

I, Ward Connerly, declare:

I am an individual Petitioner and President of Petitioner Californians for Equal Rights and Co-Chair of Petitioner Californians for Equal Rights / No on 16, and I am authorized to execute this verification on the organization's behalf. I have read the foregoing emergency petition for writ of mandate and know the contents thereof to be true, except as to those matters that are stated on information and belief, and, as to those matters, I believe them to be true.

Executed August 9, 2020 at Rio Linda, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

By:_____
Ward Connerly

PROOF OF SERVICE

I am over the age of 18 and not a party to this cause. I am employed in the county where the mailing occurred. The following facts are within my first-hand and personal knowledge and if called as a witness, I could and would testify thereto. My business address is 400 Capitol Mall, Sacramento, CA 95814. On August 9, 2020, I served the foregoing documents entitled:

1) Petitioners' Emergency Petition for Writ of Mandate and Memorandum of Points and Authorities

2) Petitioners' Motion for Judicial Notice in Support of Emergency Petition for Writ of Mandate

3) Petitioners' Appendix of Exhibits

4) Reporter's Transcript of Writ of Mandate, Aug. 7, 2020, Sacramento Cty. Super. Ct. Case No. 34-2020-80003439 (Hon. Steven M. Gervercer, Dep't 27)

By forwarding the document(s) by electronic transmission on this date from steve@benbrooklawgroup.com to the Internet email address listed below:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 9, 2020, at Sacramento, California.

s/*Stephen M. Duvernay*
Stephen M. Duvernay